1951. **K** **File No.** O. Irrigation 51

Legal Dept-.

~~A~~ **BRANCH**

Subject:— Opinions under the Bombay Irrigation Act 1879

P.13/2

File No. O. Irrigation | 51

Gen. 194

672-A

CONTENTS.

Legal Department File No. D. Irrigation /51.

Sr. No.	R.T. No. / O. No.	Subject.	Pages.
		Opinions under the Bombay Irrigation Act, 1879.	
		Section 30.	
1.	13925 30/8/1951.	Whether the refusal to supply water to Shri Somaiya for irrigation is valid	1 - 6.
2.	14288 7/9/1951.	Section 5. Whether there is any legal objection to notifying the water of Khari river under Section 5.	7 - 8.
3.	18262. 16/11/1951.	As in item No. 1 above.	9 - 16.
4.	19087 28/11/1951.	Section 5 and 73 Whether it is necessary to declare tube well scheme under section 5.	17 - 18.

GJT. 4. 7. 4 cm.

Legal Department.

Irrigation Act, 1879 (Bom. VII of 1879) sec. 30.

It appears that the Superintending Engineer, Deccan Irrigation Circle wrote to Shri Karale in 1939 as follows:

"In continuation of this office No. 3686 dated the 23rd June 1939, I have to inform you that under orders of the Honourable Minister, P.W.D. you will be allowed to irrigate cane to the extent of 100 acres on the tail outlet of Dy. No. of the Godavari Right Bank Canal permanently so long as you may wish to do so, on condition that you agree to take canal water by measurement on Volumetric basis of =12" depth at the outlet-head at the rate which may be sanctioned by Government hereafter". He was further informed that "it would apply to new cane plantation from the 15th February 1940 onwards, and till then you should continue your cane irrigation on outlets 2 and tail as at present".

There is no properly executed agreement for water supply for irrigation on Shri Karale. However the Executive Engineer, Nasik Irrigation Division in accordance with the general orders of Government desiring that agreements should be made with irrigators having substantial areas of sugar cane on volumetric supply had sent to him a draft, which he had approved on 5th April, 1950. No agreement was however executed between him

and Government. Shri Karale has now transferred his land together with the right to the supply of water for irrigation to one Somaiya. The supply of water for irrigation has now been stopped on the ground that the right to the supply of water given by Government to Shri Karale was a personal right and as such was not transferable by him. R.L.A. is requested to advise whether the refusal to supply water to Shri Somaiya for irrigation is valid.

Section 30 of the Bombay Irrigation Act, 1879 provides;

> "Every agreement for the supply of canal-water to any land, building or other immoveable property shall be transferable therewith, and shall be presumed to have been so transferred whenever a transfer of such land, building or other immoveable property takes place.
>
> No person entitled to the use of any work or land appertaining to any canal, and except in the case of any such agreement as aforesaid, no person entitled to use the water of any canal, shall sell or sub-let, or otherwise transfer, his right to such use without the permission of a Canal-Officer duly empowered to grant such permission."

It is clear from these provisions that the agreement for supply of water would be transferable alongwith immoveable property in respect of which supply is given. Shri Karale, transferred the land together with the right to the supply of water to Shri Somaiya. Prima facie therefore, Shri Somaiya would be entitled to the supply of water under section 30. It is however contended that the agreement not being executed between Government and Shri Karale would not be valid and cannot be recognised as an agreement within the meaning

of section, 30. That is not correct. Section 30 does not expressly state that the agreement must be in writing. However, under section 175(3) of the Government of India Act, 1935, an agreement to be binding was required to be executed on behalf of the Governor by such person and in such manner as he may direct or authorize. This provision implies that an agreement to be valid must be in writing. However, the Bombay High Court has held that an agreement could be spelt out of correspondence. Consequently, if the correspondence discloses that any offer or acceptance was made by or on behalf of Government an agreement concluded on the basis of such offer or acceptance would be binding on Government. In the present case the orders allowing Shri Karale to irrigate cane to the extent of 100 acres etc., were issued under the instructions of the Honourable Minister, P.W.D. and since then he has been allowed to irrigate his land and the irrigation cess as per those orders was being recovered from him. Further, Shri Karale was shown the draft agreement which was to be entered into between him and Government and he approved of it. In the circumstances it appears that a valid agreement between Government and Shri Karale for the supply of water for irrigating 100 acres of land can be inferred and it would be binding on Government. If so, section 30 of the Bombay Irrigation Act will apply and Shri Somaiya to whom the land has been transferred would be entitled to the benefit of that agreement viz. the

right to the supply of water for irrigating 100 acres of land.

Sd/-

Additional Secretary to Government.

U.R. to P.W.D. No. 13925, dated 30th August 1951.

GJT. 30.6. 4 cs.

OFFICE OF THE R.L.A.

Irrigation Act, 1879, sec. 5.

As the Kalambandhi villagers have up their riparian rights, there would be no legal objection to notifying water of Khari under section 5 of the Bombay Irrigation Act, 1879.

Sd: J.R. Dhurandhar.
6/9.
Remembrancer of Legal Affairs.

U.R. to P.W.D. No. 14288, dated the 7th September 1951.

GJT: 30.6. 4 cs.

OFFICE OF THE P.J.A.

In his last opinion No. 13925 dated the 20th August 1951, the Additional Secretary opined that in view of the circumstances of the case, an agreement from correspondence could be spelt, and under section 30 of the Bombay Irrigation Act Shri Somaiya, to whom the land had been transferred by Shri Karale, would be entitled to supply of water for irrigating 100 acres of land. The P.W.D. has now drawn the attention of R.L.A. to the following new facts in the light of which the R.L.A. is requested to reconsider the previous opinion:

(1) A tenant cultivator is not given the facility of irrigation within the factory area and Shri Karale was promised that facility as an exception as he had incurred an expenditure of Rs.75,000 for heavy manuring and for purchase of mechanical equipment like tractors.

(2) Shri Karale was mainly a tenant for all his holding except 36 acres of land which he owned.

(3) Shri Karale was expressly told in December 1945 not to sell his holding without the permission of Government and he had agreed not to transfer the holding. Still he secretly carried on negotiations with various companies and in the end sold his holding to Shri Somaiya without the permission of Government.

(4) He was asked to execute a contract for the supply of water but he evaded it and went on postponing until he completed his sale transaction with Shri Somaiya. He executed a draft agreement after the sale transaction and, as such, can have no value. Even in the draft agreement which he

executed, there was no mention of the rights of an assignee.

(5) Ever since he was promised the supply of water for irrigation in 1939, he went on applying for supply of water annually in form No. 7 as a licensee and consequently such licence can be withdrawn at any time by Government.

(6) About 65 acres of land out of the total area of 100 acres of his holding were leased by Shri Karale and he had acquired the rights of a protected tenant in respect thereof. He could not, therefore, transfer the protected tenancy rights to Somaiya.

It appears that the Superintending Engineer, Deccan Irrigation Circle, in his letter dated 14th July 1939, reported to Government as follows:

> "In view, however, of the orders issued verbally by the Honourable Minister, Public Works Department, on 12-7-1939, the applicant (Shri Karale) is being allowed to concentrate all his cane irrigation to the extent of 100 acres on the tail outlet of Distributary 17 of the Godavari Right Bank Canal by 15-2-1940 and to continue it permanently there if he so wishes provided he agrees to take water by measurement on volumetric basis of 1½" at outlet head and pay the water rates that may hereafter be sanctioned by Government in this respect. The applicant has since signified his willingness to these conditions. He will be charged till then on the area basis as is done at present."

It appears from this that no period of supply of water for irrigation was fixed nor was it settled as to whether Shri Karale was given the power to assign his right to the supply of water. Further, it was not mentioned as to whether and if so when he was required to execute an agreement. It appears that it is the usual practice with P.W.D. to take an agreement in writing in respect of supply of water in such cases. Further, after 1939, Shri Karale went on applying every year in form No. 7 for the supply of water. If it were

the intention of the parties that the contract had been concluded and no further agreement in writing was necessary, it would not have been necessary for Karale to apply every year in form No. 7 for the supply of water. Obviously, therefor the intention of the parties was that an agreement in writing as usual was required to be executed between the parties. In Eccles v. Bryant and Pollock (148 Chancery 93), X in April 1943 agreed to sell Y a house subject to contract. On June 11 X's Solicitors wrote to Y that X has signed his part of the contract drafted by Y's Solicitors. Y's Solicitors a after some further inquiries posted on June 18 to X's Solicitors draft of Y's part of the contract signed by Y. Before this letter was delivered to X's Solicitors, they wrote to Y's Solicitors that X would not proceed with the sale owing to the delay of Y in dealing with the matter. Y sued X and the court of appeal held that X wad not liable because in the absence of express agreement to the contrary, the words "subject to contract" prevented the formation of this contract from being completed until the parties had exchanged their signed copies of the contract in accordance with the ordinary practice observed in conveyance of land. In Lloyd v. Nowell (1895 2 Chancery 44) an agreement subject to preparation by solicitors and completion of a formal contract was held to exclude the formation of a binding agreement. Applying the principle enunciated in the aforesaid cases, it appears that, although the P.W.D. had agreed to supply water to Shri Karale on certain terms and conditions, it appears that a binding contract was intended to arise only when the parties executed a formal

agreemen in writing. This inference is re-inforced by the fact that Shri Karale was informed from time to time to execute an agreement in writing and that he ultimately executed a draft agreement in 1950 and forwarded it to the Executive Engineer for execution on behalf of Government.

Section 30 of the Bombay Irrigation Act, 1879, provides that every agreement for the supply of canal water to any land, building or other immoveable property shall be transferable therewith and shall be presumed to have been so transfered whenever a transfer of such land, building or other immoveable property takes place. It is apparent from this provision that the presumtion that the transfer of land carries with it the transfer of the right to the supply of canal water can be rebutted. In the present case Shri Karale was expressly given to understand that he should not rransfer his holding without the cansent of Government. This restriction contemplated that Shri Karale could not transfer his right to the supply of water along with the transfer of the land for if Shri Karale could apply for sanction for transfer of the land, Government could sanction it withholding the concession of the supply of water. Further, he had agreed also not to transfer his holding without the previous approval of Government. Even the draft agreement which he executed in 1950 does not mention that the right to the supply of canal water would be available to an assignee. Besides, even in the compromise decree which was passed by the

(continued from page No. 15.)

Court, Shri Karale is not made liable to any damages in the event of Government refusing to supply canal water. This indicates that Shri Karale was all the while conscious of the fact that in the event of the transfer of the land, Government was not bound to continue the supply of water.

As stated above, out of 100 acres of his holding Shri Karale owned only 36 acres. The rest of his holding was taken by him on lease and he had acquired the rights of a protected tenant under the Bombay Tenancy and Agricultural Lands Act. The protected tenancy rights are inalienable. Consequently the transfer of 65 acres of his holding which he held as a protected tenant is clearly illegal and Government cannot recognise the right of Somaiya to this area. If so, in any event Somaiya cannot claim the transfer of the right of Shri Karale to the supply of canal water to this area. In these circumstances, Government may refuse to recognise the right of Shri Somaiya to the supply of canal water to the holding transferred to him by Shri Karale.

Sd: J.R. Dhurandhar.

16/11.

Remembrancer of Legal Affairs.

U.R. to P.W.D. No. 18262, dated the 16th November 1951.

GJT. 4.7. 4 cs.

Legal Department.

Bombay Irrigation Act, 1879 - Sections 5 and 73.

It appears from the papers underlying the enactment of the Bombay Irrigation (Amendment) Act, 1950, that section 73 of the Irrigation Act was specially amended by inclusion of the words "well, tube well, artesian well" therein in order to enable Government to notify these works as second class irrigation works. (vide para 4 of P.W.D. Note at p. 59 of the Bill File and para 5 of the S.O. Rs). However, if Public Works Department does not desire to notify the tube wells under section 73, it is not legally necessary to notify the works under section 5 of the Act in order to enable Government to levy fees. The term" canal" is defined in section 3(1) of the Act and it includes all canals, channels, pipes and reservoirs constructed, maintained or controlled by any Government for the supply or storage of water. In the circumstances if the water of the tube wells is supplied by pipes, channels or canals constructed by Government these pipes etc. will be canals within the meaning of the Act and the Bombay Canal Rules will apply to them. However, if the tube wells are not declared either under section 5 or section 73 of the Act, Government will not be in a position to take advantage of certain statutory provisions which are available upon such declaration (vide R.D.A's opinion No. 5345 dt. 20-9-1953) and in the circumstances it is for the Department to decide whether such a declaration should not be made.

Sd ——
Additional Secretary to Government.

U.R. to P.W.D, No. 19087, dated the 28th November 1951.

GJT. 4.7. 4 cs.